

Teaching to the Test

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I practiced criminal law for seven years before I began teaching, so I thought it was going to be easy for me to teach the subject. I was not thinking clearly. What I had been practicing was criminal procedure and evidence law. I had almost no live issues in substantive criminal law. I made one vagueness challenge, never had an actus reus defense, never had a mistake of fact or law defense (as I explain to the students, if your best defense was “I did it, but I made a mistake,” you should get out of the business). I did not even get a case with a causation issue. Sure, I had to know the elements of the crimes and of the affirmative defenses, but that was basic, uncomplicated stuff.¹ For me personally, I had to find a way to make teaching some of the arcane issues in criminal law a fulfilling and useful exercise.

After many years of trying to teach the *subject matter* as the *sine qua non*, two things happened to change my focus. I was a member of the University’s Southern Association of Colleges and Schools (SACS) accreditation team and I became Vice Dean. Both of these positions forced me to evaluate the objectives of our courses of study and our methods of assessing our students’ progression toward those objectives. Our assessment method is a single, anonymous final examination in most classes. From the beginning, I have given the students issue-spotting essay examinations. After thirteen years of grading these, I have come to realize that almost all of the students can learn the law. Many of those who don’t do well say, “But I knew the law backward and forward.” I believe them. Knowing the subject matter merely buys them an entrance ticket to the exam; it does not guarantee performance.²

SACS required that all of us put “measurable objectives” in our syllabi and I decided to take this seriously and determine what I was going to be able to teach the students that I could measure in the final examination. Here are my stated objectives:

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¹ I will note that I was a public defender in a “state” jurisdiction (Washington, DC). With the obscene growth of federal criminal statutes, the practice of federal criminal law offers a lot more opportunities for argument on statutory interpretation, particularly in the area of mens rea and vagueness.

² If you test the students on their knowledge of substantive criminal law through short answers or multiple choice questions, then that method of assessment would be appropriate to measure what was taught. This essay is for those of you who wish to see some legal synthesis or analysis in an essay exam.

At the conclusion of the course, I hope you can: (1) define legal terms used in criminal statutes; (2) point out ambiguities in those terms; (3) interpret those ambiguities consistent with rules of statutory interpretation; (4) interpret those ambiguities from both a defense attorney's and a prosecutor's standpoint; (5) apply the law to a set of facts from both a defense attorney's and a prosecutor's standpoint; and (6) analyze the legal and factual issues in an organized and persuasive way.

Therefore, I openly and actively pursue these objectives with the students.

The substantive criminal law is a vehicle to teach the students a skill: to engage in legal reasoning, synthesis and analysis, and to measure that skill through the final examination. The end game—the object of the course—is to give them the skills to write an excellently reasoned final examination. I don't hide past exams; I use them constantly and freely. Working through them should become fun. I hand out bits and pieces of them as they become doable and students can try their hand at them and e-mail them to me, and we go over many in class. The final exam should not be a horrifying surprise.

In class, we practice ordered, persuasive legal analysis orally. The students are the prosecutors and the defense attorneys making the arguments to me, the judge, albeit a judge who has to be educated on the law. If they are sloppy or imprecise, I try to coax them into precision in order to make their argument the most concise and persuasive, because the judge has limited patience and time. It is important to make the arguments in the right order: proponent, opponent, response and response to the response. Even the question of "Who starts?" must be answered. Sometimes it is worth mapping out the order and content of an argument out on the whiteboard for all to see.³ My goal is to get them to articulate

³ A good example is in the area of mens rea and statutory interpretation, which I map out with them. Assume a statute with no mens rea and a defendant who committed the acts without knowledge. *Staples v. United States*, 511 U.S. 600, 602 (1994), is a good example, where a statute prohibited possessing an unregistered firearm where a "firearm" is an automatic weapon. Staples had a gun that had been altered from a semi-automatic to an automatic weapon and argued he did not know it fired automatically. His mens rea was arguably at least reckless given the alterations in the weapon. The mapping of the argument might go like this:

Prosecution: No mens rea required by the statute; did the acts, therefore guilty.

Defense: (1) No mens rea listed but the common law (and Model Penal Code [MPC]) rule is that every criminal statute must have a mens rea and that mens rea must be at least reckless.

(2) Reckless = consciously aware of a substantial and unjustifiable risk that (he possessed an automatic).

(3) Here, defendant not reckless because (use facts to support).

Prosecution: (1) Except if it is a public welfare offense which is strict liability. Here, it is a public welfare offense because (a) deals with inherently dangerous items; (b) little or no jail time; etc.

(2) In any case, the defendant was consciously aware of substantial and unjustifiable risk because (use facts to support).

both sides fully, back and forth, to the logical endpoint. I do not ask for conclusions on the exam—most of us test in the gray areas and it will be a long time in the students' careers before they become judges.

This is distinctly non-Socratic in its method. While it may be fun for all involved to engage in Socratic dialogue and whet the students' appetite for academic exercises, it is a debilitating experience for them to take a final essay examination that requires them to engage in a legal synthesis and analysis that they have not had to do in class or seen demonstrated. I am a firm believer that we cannot leave this to the Legal Research and Writing faculty alone. All of us should be openly and consciously helping students to hone this skill in their first semester of law school.

